Notice of Judgment Nos. 36–37. Issued January 30, 1909.

United States Department of Agriculture,

OFFICE OF THE SECRETARY,

BOARD OF FOOD AND DRUG INSPECTION.

NOTICE OF JUDGMENT NOS. 36–37, FOOD AND DRUGS ACT.

(N. J. 36.)

MISBRANDING OF CANNED APPLES AND BLACKBERRIES.

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906, and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court in the case of the United States *v.* 100 Cases of Tepee Apples and 172 Cases of Tepee Blackberries, a proceeding of libel for seizure and condemnation of said goods under section 10 of the aforesaid act, lately pending, and finally determined on October 23, 1908, in the district court of the United States for the western district of Missouri, wherein C. H. Godfrey & Son, Benton Harbor, Mich., were claimants. The apples and blackberries were misbranded within the meaning of section 8 of the aforesaid act, for that the cans containing them were labeled, respectively, "Tepee Apples, Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan," and "Tepee First Quality Blackberries. Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan," whereas, in fact, the said apples and blackberries were grown and packed in Springdale, Ark.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The exceptions of the claimants to the sufficiency of the libel on the alleged grounds of the unconstitutionality of the act and the absence of a preliminary hearing by the Secretary of Agriculture having been severally overruled, and a jury having been waived, and the case submitted to the court upon the pleadings, an agreed statement of facts, deposition of C. H. Godfrey, and arguments of coun-

sel, the court found the facts and pronounced the conclusions of law thereupon as follows:

In the District Court of the United States for the Western Division of the Western District of Missouri.

UNITED STATES OF AMERICA *v.* 100 CASES OF TEPEE APPLES AND 172 CASES of Tepee Blackberries.	No. 245.

ORDER.

Now, on this day this cause coming on for further hearing, the United States appearing by A. S. Van Valkenburgh, esq., United States attorney for the western district of Missouri, and the intervenors, Godfrey & Son, of Benton Harbor, Michigan, appearing by their attorneys, Messrs. Kelly, Brewster & Buchholz and Thomas E. Lannen, and said cause having been heretofore submitted upon an agreed statement of facts by the parties hereto, and the deposition of C. H. Godfrey, and upon the pleadings of the parties hereto, and the court having heard the arguments of counsel, and the matters all and singular being submitted to the court, and the court being fully advised in the premises, doth find:

First. That the apples and blackberries seized by the United States marshal in this case, and now in his possession, were packed by C. H. Godfrey & Son at Springdale, Arkansas, and were by them transported in interstate commerce from Springdale, Arkansas, to Kansas City, Missouri, and sold to Ridenour-Baker Grocery Company, at Kansas City, Missouri, where they were seized in the original unbroken packages by the United States marshal for the western district of Missouri.

Second. That the apples and blackberries seized by said United States marshal as aforesaid were grown at and near Springdale, Arkansas.

Third. That the cans containing said apples and blackberries were misbranded in this, to-wit, that the labels and brands placed on said cans by said C. H. Godfrey & Son contained the following as to the place where said apples and blackberries were packed, that is to say, "Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich."

Fourth. That said brands and labels so placed on said cans of apples and blackberries by said C. H. Godfrey & Son were calculated to and do mislead the purchasers and consumers of said apples and blackberries as to the place where said apples and blackberries were grown and packed.

Fifth. That said apples and blackberries were subject to seizure as being misbranded under the provisions of the act of Congress approved June 30, 1906, entitled, "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," and more particularly under the provisions of section ten of said act, and that the United States marshal did, on or about the 30th day of January, 1908, seize said apples and blackberries under the provisions of said act, and the same are now in his possession.

Wherefore, it is ordered and adjudged by the court that said United States marshal shall label and brand said cans containing said apples and blackberries as having been packed at Springdale, Arkansas; that the said marshal shall advertise and sell said apples and blackberries as provided by law, and shall, out of the proceeds of said sale, pay the costs incurred in this action, and pay the

remainder, if any, into the Treasury of the United States, as provided in section ten of said act of Congress: *Provided, however*, That the said C. H. Godfrey & Son, intervenors herein, upon the payment of the costs of this libel and the execution of a good and sufficient bond, in the sum of fifteen hundred dollars, conditioned that the said C. H. Godfrey & Son shall label said goods in accordance with the judgment of the court as herein expressed, and further conditioned that they will not sell or dispose of said apples and blackberries in violation of the laws of the United States, or the laws of any State, Territory, district, or insular possession of the United States, shall have the right to the possession of said apples and blackberries now in the possession of said United States marshal, and the said United States marshal is hereby directed to deliver said apples and blackberries to the said C. H. Godfrey & Son, or their duly authorized agents, upon the execution and delivery of the aforesaid bond and the payment of the aforesaid costs, within twenty days from this date.

SMITH MCPHERSON, *Judge.*

OPINION OF THE COURT.

Thereafter, and on the 23d day of October, 1908, the court rendered its opinion in substance and in form as follows:

In the District Court of the United States, Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA *v.* 100 CASES OF TEPEE APPLES AND 172 CASES of Tepee Blackberries.	No. 245.

A. S. Van Valkenburgh, United States attorney, and *L. J. Lyons*, assistant United States attorney, for the Government.

Kelly, Brewster & Buckholz and *Thomas E. Lannen* for C. H. Godfrey & Son.

OPINION.

SMITH MCPHERSON, *Judge.*

This case is by information filed by the United States attorney, charging that Ridenour-Baker Grocery Company, of Kansas City, Missouri, has in its possession cases of apples and blackberries in original unbroken packages which are misbranded within the meaning of the act of Congress approved June 30, 1906, entitled "Food and Drugs."

The fruits were thereupon seized by the marshal, and notice thereof given. In due time C. H. Godfrey & Son, of Benton Harbor, Michigan, appeared and made defense. A jury was waived and the case tried to the court. The evidence consists of an agreed statement of facts and the deposition of C. H. Godfrey. And these are the facts:

Godfrey & Son pack and can fruits, with their factory at Benton Harbor, Michigan, and such has been their business for several years, with their principal office at that place, the fruits grown there, as well as in other States. Their only post-office address was there.

The apples and berries in suit were grown at and near Springdale, Arkansas, and by Godfrey & Son there bought and canned, and by them later on sold and shipped to the Ridenour-Baker Company at Kansas City. Each can of apples was labeled with a blue paper about ten inches long and five inches wide, with a picture of a red apple, an Indian tent, or "tepee," with the words "Tepee Apples; Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich."

The berry cans had the same label in all respects, except the picture was of a cluster of blackberries and the words "Tepee Blackberries."

The opinion of the Secretary of Agriculture was that such words to the exclusion of Springdale, Arkansas, where the fruit was grown and packed, misleads the public. Evidence is offered that Godfrey & Son did not know of such opinion, and that they believed the cans were properly labeled. Such evidence is not admissible and is ruled out.

The evidence shows that Michigan and northern apples are of a better quality and flavor than are Arkansas apples, and that is a matter of common information. As to the berries, the evidence is not so certain, although the deposition of Mr. Godfrey fairly shows that Michigan blackberries, with one variety excepted, are better than those of Arkansas.

Adulteration of goods and false labeling had become so common that it was well-nigh impossible to purchase pure goods or that which was called for. The same was true as to medicines. Congress undertook to remedy it. The one purpose was to prevent the sale of adulterations. The other purpose was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor can not determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.

In this case the label is very attractive to the eye, and of course its only purpose is to sell the fruit. But for that the label would not be on the can. That is what the purchaser at retail looks for, and that is what, more than any other statement or argument, induces the purchase. That the evidence shows that to be misleading, because the words thereon, "Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.," is understood by all adults and children as not only being there packed, but fruits grown in that vicinity. Of course it is idle to insist, as Mr. Godfrey does, that the fruits could not have been raised *within* the city of Benton Harbor. The term "misbranded" as used in the statute, as defined by the statute, is "the package or label of which shall bear any statement designed or device regarding such article * * * which shall be false or misleading *in any particular*, and to any food which is falsely branded as to the State, Territory, or country in which it is *manufactured or produced.*"

Again, the statute recites, "If it be labeled or branded so as to deceive or mislead the purchaser, it should be considered as misbranded."

There can be no doubt, as it seems to me, that any purchaser from this label would be deceived, in that he would be receiving Arkansas fruits instead of Michigan fruits. Deception is seldom practiced by a literal falsehood, but is usually joined with some truth, so that the entire statement will deceive. And so in this case. Of course the statement is true that Godfrey & Son reside and do business at Benton Harbor, but that one true statement is used in conjunction with the packing of the fruits, and I repeat that I would believe from that, as would all others, that it is Michigan fruit within the cans. And if Godfrey & Son believe, and if it be true, that Arkansas fruits are as good or better than Michigan fruits, let that fact be disclosed by labels and otherwise. This statute is to protect consumers and not producers. It is a most beneficent and righteous statute, and within the powers of Congress to legislate concerning, and should be enforced. It can not be enforced if it is to be emasculated, as is sought in the present case. The order will be that the fruits and cans under

seizure will be sold by the marshal after being properly branded. This will be done instead of destroying them, as the fruits are not deleterious.

But this order may be avoided under the statute if Godfrey & Son will pay the costs and give bond to properly brand the goods in accordance with this opinion, and sell them in all respects in conformity to law.

KANSAS CITY, MISSOURI, *October 23, 1908.*

The case grew out of the following facts:

On or about January 1, 1908, an inspector of the Department of Agriculture found in the possession of the Ridenour-Baker Grocery Company, Kansas City, Mo., 100 cases of canned apples, each can being labeled "Tepee Apples. Packed by C. H. Godfrey & Son, Watervliet and Benton Harbor, Michigan," and 242 cases of canned blackberries, each can being labeled "Tepee First Quality Blackberries. Packed by C. H. Godfrey & Son, Watervliet and Benton Harbor, Michigan." The fruit had been shipped to Ridenour-Baker Company by C. H. Godfrey & Son, from Springdale, Arkansas, during the month of September, 1907. The inspector having procured evidence showing that the fruits involved in this case were grown and packed in Arkansas, it was apparent that they were misbranded under section 8 of the Food and Drugs Act, and in consequence thereof, on January 24, 1908, the Secretary of Agriculture reported the facts to the United States attorney for the western district of Missouri, who duly filed a libel for seizure and condemnation of the goods under section 10 of the act, with the result hereinbefore set out.

H. W. WILEY,
F. L. DUNLAP,
GEO. P. MCCABE,
Board of Food and Drug Inspection.

Approved:

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *January 11, 1909.*

(N. J. 37.)

ADULTERATION OF MILK (WATER).

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906, and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court in the case of the United States against Andreas Griebler lately pending in the district court of the United States for the eastern district of Illinois, wherein the said Griebler was charged with the violation of section 2 of the aforesaid act alleged to have been committed in the shipment and delivery for shipment of adulterated milk—that is to say, milk which contained an excess of water—from Illinois to Missouri.